

BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

MIKE RADAKOVICH,)	
)	OSPI 294-03
)	
Appellant,)	
)	DECISION AND ORDER
)	
vs.)	
)	
BOARD OF TRUSTEES, DANIELS)	
COUNTY SCHOOL DISTRICT NO. 1,)	
Scobey, Montana,)	
)	
Respondent.)	
)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

The March 10, 2003 decision by the Acting Daniels County Superintendent of Schools affirming the decision of the District to terminate Appellant's services as a tenured teacher and denying the relief requested by the Appellant is hereby **AFFIRMED**.

PROCEDURAL HISTORY

This is an appeal by Mike Radakovich ("Appellant") of an Order issued by the Acting County Superintendent of Schools ("County Superintendent") dated March 10, 2003.

On April 12, 1994, the Board of Trustees of School District No. 1, Scobey ("the District") voted to terminate the services of Appellant, a tenured teacher, pursuant to §20-4-204, MCA (1993) as part of a reduction-in-force ("RIF"). Appellant appealed the District's decision to the Daniels County Superintendent of Schools. At this same time the Scobey Education Association, on behalf of Appellant, pursued a grievance under the Collective Bargaining Agreement ("CBA") against the District through binding arbitration as provided in the CBA. Arbitrator Thomas F. Levak denied Appellant's grievance and held that his termination had not

been in violation of his contractual rights under the terms of the CBA. The County Superintendent issued Findings of Fact, Conclusions of Law, Opinion and Order on September 18, 1995 concluding that he would not "redecide" contractual issues determined by the Arbitrator and that Appellant's termination was not in violation of his statutory rights under §20-4-204, MCA (1993). Appellant appealed that decision to the State Superintendent of Public Instruction who subsequently affirmed the County Superintendent's decision on January 6, 1998.

Appellant filed a Petition for Judicial Review of the State Superintendent's decision. The Fifteenth Judicial District Court reversed the State Superintendent's decision. The District filed an appeal with the Montana Supreme Court. The Montana Supreme Court issued its decision on July 6, 2000 and remanded the case to the County Superintendent with instructions that the County Superintendent "follow the applicable statutes and rules, as set forth in [*Baldrige v. Board of Trustees, Rosebud County School District #19, Colstrip*, 264 Mont. 199, 870 P.2d 711 (1994)] and enter appropriately supported and reasoned findings of fact and conclusions of law concerning whether objective RIF criteria were fairly applied as well as Radakovich's claim under §20-4-203, MCA."

The County Superintendent issued Findings of Fact, Conclusions of Law and Order on March 10, 2003. Appellant filed a Notice of Appeal of that Order on March 28, 2003.

The County Superintendent's Findings of Fact, Conclusions of Law, and Order are the subject of this appeal. The issues on appeal are:

1. Whether the County Superintendent erred in determining that there "is no legal basis for either a court or this County Superintendent to review" the arbitrator's decision?
2. Whether the protections provided by §20-4-203, MCA are limited to "recall" or "rehire" situations?
3. Whether Appellant's services as a tenured teacher were properly terminated pursuant to §20-4-203 and 20-4-204, MCA (1993)?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. *Harris v. Trustees, Cascade*

County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 277, 786 P.2d 1164, 1166 (1990) and *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may not substitute her judgment for that of a county superintendent as to the weight of the evidence on questions of fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." *Wage Appeal v. Board of Personnel Appeals*, 208 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

Conclusions of law are subject to more stringent review. The Montana Supreme Court held that conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

FACTUAL SUMMARY

1. Appellant was certified as a secondary education teacher endorsed in the field of social studies by the State of Montana.

2. Appellant was employed by the District in 1987 as a full-time social studies teacher and worked continually for the district until 1994.

3. At the time of his termination in April of 1994, Appellant was a tenured teacher employed under a CBA which provided for final binding arbitration of grievances.

4. During the 1993-94 school year, District Superintendent Hill determined that the District needed to consider funding reductions due to the funding reforms enacted by the 1993 Legislature, inflation, and other cost factors. He recommended that the District make \$80,000 in staffing and \$37,000 in non-staffing reductions.

5. At the March 1994 Board meeting the District adjusted the reductions to \$60,000 in staffing and \$38,000 in non-staffing items. Ultimately the District made a total of \$144,000 in general fund reductions, with \$70,000 being allocated to staffing.

6. On March 14, 1994, Superintendent Hill met with High School Principal George Rider to discuss possible staffing reductions and the criteria by which the staffing reductions would be made. They also discussed several possible staff reduction plans.

7. Superintendent Hill determined that the criteria for implementing staff reductions would be:

- a. seniority and evaluations where possible;
- b. endorsements in the programs offered by the district; and
- c. in cases where a position is cut, what other teachers with endorsements could be re-assigned to cover those classes.

The criteria also provided that multiple endorsements would be preferred due to the District's ability to assign a teacher in more than one subject area and that the total number of students assigned to a teacher would be consistent with accreditation standards.

8. On March 15, 1994, Superintendent Hill met with the teaching staff, provided them with a copy of the criteria to be used in implementing the staffing reductions, some possible reduction options and a seniority list developed by the District Clerk.

9. During the 1993-94 school year, the District employed three teachers other than Appellant who were certified to teach social studies or history courses. All of these teachers were endorsed in other subject areas as well as social studies/history.

10. Superintendent Hill recommended to the District that Appellant's services be terminated and that his former class assignments be divided among the three other teachers with social studies or history endorsements.

11. The key criterion used by Superintendent Hill in making the decision to recommend Appellant's termination was the "multiple endorsements" criterion.

12. Superintendent Hill testified that Appellant's evaluations were equal to or as good as any other teacher in the system. Evaluations were not the criterion upon which the decision to RIF Appellant was based.

13. Superintendent Hill testified that Appellant had seniority over approximately 14 other staff members. Of the staff members with multiple endorsements to which Appellant's

classes were assigned, Appellant was junior to one and senior to two others, with one of those teachers not having tenure.

14. Appellant was not the only staff member affected by the RIF implemented by the district in the spring of 1994. The District also eliminated a full time position at the elementary level and made partial FTE reductions for three other staff members for a savings in excess of \$70,000.

15. By letter dated March 17, 1994 Superintendent Hill recommended to the Board of Trustees that Appellant's employment with the District be terminated. The reasons for the recommendation were that the position held by Appellant was eliminated due to financial considerations and that Appellant had no other certification or licensure that would permit continued employment.

16. By letter dated March 21, 1994 Karen Tande, the Board chairman, advised Appellant in writing of her receipt of the recommendation from Superintendent Hill. She provided him with a copy of Superintendent Hill's recommendation and a copy of §20-4-204, MCA (1993). Ms. Tande's letter also advised Appellant of his right to a hearing and the process that would be followed at the hearing. The letter was sent by certified mail that was acknowledged as received by Corrine Radakovich on March 23, 1994.

17. A hearing on Superintendent Hill's recommendation to terminate Appellant's services was held before the Board on April 12, 1994. Appellant was present and represented by Maggie Copeland, his union representative. Following the receipt of information and evidence by both the District and Appellant, the Board took formal action to accept Superintendent Hill's recommendation and terminated Appellant's services as a tenure teacher pursuant to §20-4-204, MCA (1993).

18. Appellant simultaneously appealed this decision to the County Superintendent and filed a grievance under the provisions of the CBA.

19. Arbitrator Thomas F. Levak denied Appellant's grievance and concluded that his termination had not been undertaken in violation of any of his contractual rights under the terms of the CBA.

OPINION

Issue 1. Did the County Superintendent err in determining that there "is no legal basis for either a court or this County Superintendent to review" the arbitrator's decision?

The Montana Supreme Court remanded this case for the limited purpose of requiring the "County Superintendent [to] follow the applicable statutes and rules, as set forth in *Baldrige*, and enter appropriately supported and reasoned findings of fact and conclusions of law concerning whether objective RIF criteria were fairly applied as well as Radakovich's claim under §20-4-203, MCA."

The issue of whether or not the County Superintendent had the jurisdiction to review the arbitrator's decision was decided by the Supreme Court in *Radakovich v. Board of Trustees, Daniels County*, 2000 MT 176N. The Supreme Court stated: "the District Court erred in concluding that it could review the arbitrator's decision concerning whether the termination of Radakovich violated the terms of the CBA."

Therefore, the State Superintendent determines that this issue has been fully and finally resolved by the Montana Supreme Court and affirms the County Superintendent's Conclusion of Law #2.

Issue 2. Are the protections provided by §20-4-203, MCA limited to "recall" or "rehire" situations?

The County Superintendent addresses the applicability of §20-4-203, MCA in his Conclusions of Law 8-16. The State Superintendent's duty upon review is to determine if the County Superintendent's interpretation of the law is correct. *Steer, Inc., supra*.

The portion of §20-4-203, MCA that is in dispute provides as follows:

"(2) The tenure of a teacher with a district may not be impaired upon termination of services of the teacher if the following conditions exist:

(a) the tenure teacher is terminated because the financial condition of the district requires a reduction in the number of teachers employed; and

(b) continued employment rights are provided for in a collectively bargained contract of the district."

The parties argue different interpretations of this statute. Where the language in a statute is subject to different interpretations it is necessary to determine the intent of the legislature in enacting the statute.

"Statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required [citing cases]. If the plain

words of a statute are ambiguous, however, the next step in judicial interpretation of the statute is to determine the intent of the legislature. *Small v. Board of Trustees*, 306 Mont. 199, 31 P.3d 358.

"[A] statute will not be interpreted to defeat its evident object or purpose; the legislative objective is of prime consideration in interpreting statutes." *Howell v. State of Montana*, 263 Mont. 275, 868 P.2d 568 (1994).

Section 20-4-203 was amended by the Legislature in 1989 by adding subsection (2) quoted above. The committee testimony as stated in the County Superintendent's Conclusion of Law No. 14 supports the position that this section does not apply in the instant case. This section only applies when a teacher has been laid off due to a reduction in enrollment or funding and is rehired by the district.

Appellant alleges that neither his tenure rights nor his employment may be impaired if there is a reduction in force. The plain reading of the statute contemplates that a termination of services has taken place. The statute does not contain a prohibition against impairing a teacher's "employment". Appellant's employment with the district was terminated, however, his tenure was not impaired. In the event the District's financial situation improved and they determined to again offer a full time social studies position, the provisions of §20-4-203(2) would have applied in protecting Appellant's tenure status upon rehire by the District, i.e. Appellant could have been rehired as a tenure teacher with seven years of service with the District.

Therefore, the State Superintendent determines that the County Superintendent's interpretation that §20-4-203(2) does not apply in this case is correct.

Issue 3. Were Appellant's services as a tenured teacher properly terminated pursuant to §20-4-203 and 20-4-204, MCA (1993)?

There is no dispute between the parties that the District followed the procedural requirements set forth in §20-4-204, MCA. The District Superintendent made a recommendation to the trustees that Appellant be terminated. The recommendation stated the reasons for the recommended termination. The trustees notified Appellant of the recommended termination before May 1 and advised him of his right to a hearing. The notification was delivered by certified mail and included the recommendation from the District Superintendent and a copy of §20-4-204, MCA. The hearing was properly conducted within the time allowed. The procedural requirements of §20-4-204, MCA have been met.

The only procedural requirement of §20-4-203(1), MCA is that the "trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204." It is clear from the evidence introduced at the hearing that this procedural requirement has been met. The applicability of §20-4-203(2) has been addressed previously in this opinion.

The Montana Supreme Court also directed the County Superintendent to "enter appropriately supported and reasoned findings of fact and conclusions of law concerning whether objective RIF criteria were fairly applied..."

The RIF criteria used by the District are as follows:

- a. seniority and evaluations where possible;
- b. endorsements in the programs offered by the district; and
- c. where one position is cut, other teachers with endorsements would be assigned to cover those classes.

It was further determined that multiple endorsements would be preferred due to the ability to assign a teacher in more than one subject area and the total number of students assigned to a teacher would be consistent with accreditation standards.

The County Superintendent determined from the testimony of Superintendent Hill that although all criteria were considered, the deciding factor was the multiple endorsement criterion. Appellant argues that the use of the multiple endorsement criterion violated the terms of the CBA. The CBA contained language in Articles IV, VII and XI that contemplated all three criteria. Arbitrator Levak determined that "the District did not violate Article XI, Section 1, Subdivision 2 when it added the requirement of endorsements, with preference to multiple endorsements, to the two criteria set forth in that subdivision. The District argument that the fourth sentence of Article VII, Section 1 mandated the addition of the endorsement requirement is well taken."

Appellant argues that "[c]reation of the 'multiple endorsement' criterion is no different than the policy of requiring teachers to teach only in the subject areas majored in, which was declared unlawful in [*Massey v. Argenbright*, 211 Mont. 331, 683 P.2d 1332]." In *Massey* the policy requiring teachers to teach only in the subject areas they had majored in ignored the fact that the teachers were endorsed in subject areas that they had minors in and were certified by the State of Montana as qualified to teach those subjects. In the instant case Appellant was only certified to teach in social studies and could not "bump" teachers with less seniority or those that

were not tenured because he did not have the required endorsements to teach the other subjects assigned to those teachers.

The only remaining issue is whether the RIF criteria used by the District were objective and fairly applied.

As stated, the RIF criterion that was the deciding factor in making the determination to terminate Appellant, was the multiple endorsement criterion. It is obvious that this is an objective criterion. Superintendent's Exhibit #3 clearly states the teachers employed by the District and the endorsements that each held during the 93-94 school year. The three teachers retained, who were ultimately assigned to teach social studies/history classes, all had multiple endorsements and were assigned to teach classes under those endorsements. Appellant was not qualified to "bump" any of these teachers because he was not endorsed to teach all of the classes to which they were assigned.

A further review of Superintendent's Exhibit #3 reveals that there were two other teachers with single endorsements employed by the District to teach at the high school/junior high school levels. However, there were no other teachers on staff endorsed to teach in their endorsement areas, i.e. general science and industrial arts.

There is substantial evidence to support the County Superintendent's conclusion that the multiple endorsement criterion was "objective and fairly applied."

Therefore the State Superintendent determines that the County Superintendent's conclusion is correct.

CONCLUSION

The March 10, 2003 decision by the Acting Daniels County Superintendent of Schools affirming the decision of the District to terminate Appellant's services as a tenured teacher and denying the relief requested by the Appellant is hereby **AFFIRMED**.

Dated this 17th day of September, 2003.

/s/ Linda McCulloch
LINDA MCCULLOCH
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 17th day of September, 2003, I caused a true and exact copy of the foregoing "DECISION AND ORDER" to be mailed, postage prepaid, to the following:

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